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Administrative Law

Wiley W. Manuel

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by *Wiley W. Manuel**

* A.B. 1951 University of California, Berkeley. LL.B. 1953, University of California, Hastings College of the Law. Deputy Attorney General, State of California. Member, California State Bar.

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I. Introduction

The year 1969 produced little in the way of legislation affecting administrative law, and the cases reviewing administrative action noted here are not necessarily included because they indicate anything new, but because they indicate someone did not understand what is old.

The decisions of the Department of Motor Vehicles, in particular, have been the subject of most of the litigation during

the past year. These cases present most clearly the struggle of the courts to evolve some unifying principles in the application of the law to the driver who drinks. Not all the cases are in harmony, but trends seem to be developing.

II. Driver's License—Implied Consent Law

The avalanche of cases arising under the Implied Consent Law[1] continues unabated. This law requires the Department of Motor Vehicles to suspend for six months the driving privileges (1) of a person who is arrested[2] for any offense committed while driving on a public highway while under the influence of intoxicating liquor, (2) where a peace officer has reasonable cause to believe that such person has been driving on a public highway while under the influence of intoxicating liquor, (3) where the individual has been advised that the failure to submit to a chemical test to determine the alcoholic content of his blood will result in the suspension of his driving privileges and (4) where he refuses to submit to the test. Under the statute, the person has the right to choose whether the test will be of his blood, breath, or urine, and, by specific amendment enacted in 1969, he has the right to be told that he has this choice.[3]

The results of chemical tests give rise to presumptions relating to the intoxication of the driver.[4]

It has been determined that a driver who, under the above circumstances, has been requested to submit to a chemical test, has no right to the presence of counsel at the time of the request or at the time of the administration of the test.[5] A problem has arisen, however, in cases where the driver has been given the so-called *Miranda* warning before he is request-

1. Vehicle Code § 13353.

2. An arrest for drunk driving of a person involved in a traffic accident may be made without a warrant upon reasonable cause. Vehicle Code § 40300.5, added Stats. 1969, Ch. 956.

3. Stats. 1969, Ch. 1439.

4. Vehicle Code § 23126, added Stats. 1969, Ch. 231.

5. Ent v. Department of Motor Vehicles, 265 Cal. App.2d 936, 71 Cal. Rptr. 726 (1968); Wegner v. Department of Motor Vehicles, 271 Cal. App. 2d 838, 76 Cal. Rptr. 920 (1969).

ed to submit to the chemical test.[6] In some of the cases, the driver claimed that he was confused by the *Miranda* warning and that where he, because of the confusion, refused to submit to the test until his attorney arrived or he consulted with him, he should not be held to have refused. Where a person is given the *Miranda* warning and then is requested to do something by the police, if what he is asked to do is quite similar to what he is told he has a right not to do under the *Miranda* warning, his failure to do what the police have asked him to do may be the result of confusion, and should not be used against him.[7] In the cases of *Finley v. Orr*[8] and *Fallis v. Department of Motor Vehicles,*[9] the courts were so impressed by the fact that each driver had engaged in conversation and responded in an uninhibited fashion to the warning, that his later contention that the *Miranda* warning had confused him seemed unreal.

In *Reirdon v. Director, Department of Motor Vehicles,*[10] the policeman who made the demand that the driver submit to the chemical test not only gave the *Miranda* warning, but fully explained to the petitioner that he had the right to counsel only in connection with the criminal charge of driving a motor vehicle while under the influence of intoxicating liquor, and further told him that he did not have the right to have an attorney present with him in the jail at the time the chemical test was being performed. Consequently, the Court determined that the petitioner was not justified in refusing to take the test until an attorney was present. He had been clearly and unequivocally told that he had no right to the presence of counsel. Therefore, his contention of bewilderment was not at all persuasive.

6. Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974 (1966).

7. The court cited People v. Ellis, 65 Cal.2d 529, 55 Cal. Rptr. 385, 421 P.2d 393 (1966); see also Ent v. Department of Motor Vehicles, 265 Cal. App.2d 936, 71 Cal. Rptr. 726 (1968), and Manuel, ADMINISTRATIVE LAW, *Cal Law Trends and Developments 1969*, pp. 329–330.

8. 262 Cal. App.2d 656, 69 Cal. Rptr. 137 (1968).

9. 264 Cal. App.2d 373, 70 Cal. Rptr. 595 (1968).

10. 266 Cal. App.2d 808, 72 Cal. Rptr. 614 (1968).

In *Rust v. Department of Motor Vehicles,*[11] the *Miranda* warning had been given, and the driver refused to take the test until he talked to his attorney. The trial court held for the driver, and the reviewing Court affirmed the trial court. The trial court found that the driver had not unequivocally rejected the test in such a way as to excuse the peace officer from supplying further information. Consequently, the reviewing Court determined that where the officer introduced the question of the right to counsel, and it became evident that the driver thought he was entitled to an attorney and may have misconceived the warning, the officer should have elaborated by stating that the warning was inapplicable to the blood-alcohol test. The Court cited *Reirdon* as an example of a situation where the proper instruction had been given. Strangely, the Court relied upon *People v. Ellis,*[12] although a careful reading of *Ellis* will indicate that there could be no possible confusion between the right to remain silent and the right to counsel, and the duty to submit to a test. Nevertheless, *Ellis* is cited as the genesis for this result.

In *Kingston v. Department of Motor Vehicles,*[13] the Court determined that where the *Miranda* warning was given and the driver stated that he wanted to see his attorney, it was conceivable that the driver, as in *Rust,* could have misinterpreted the *Miranda* warning. If so, he was entitled to a further elaboration by the peace officer before his request to see his attorney was treated as an outright refusal to take the test. The driver was entitled to a hearing to determine whether he had so misinterpreted the *Miranda* warning.

In *Weber v. Orr,*[14] the *Rust* issue was not raised before either the Department or the Superior Court; it was raised for the first time before the Court of Appeal. The Court of Appeal, following the lead in *Wethern v. Orr,*[15] held that where the *Miranda* warning was given and the driver demanded

11. 267 Cal. App.2d 545, 73 Cal. Rptr. 366 (1968).

12. 65 Cal.2d 529, 539, 55 Cal. Rptr. 385, 390, 421 P.2d 393, 398 (1966).

13. 271 Cal. App.2d 549, 76 Cal. Rptr. 614 (1969).

14. 274 Cal. App.2d —, 79 Cal. Rptr. 297 (1969).

15. 271 Cal. App.2d 813, 76 Cal. Rptr. 807 (1969).

counsel, the driver could not be required to take the test in the absence of a further explanation that his constitutional rights did not apply to the decision to submit or not to submit to a test under Vehicle Code section 13353.

Wethern and *Weber,* then, treated as a matter of law the fact that confusion can exist under these circumstances.

The trial court in *Walker v. Department of Motor Vehicles*[16] denied the relief sought by the driver. The reviewing Court was faced with the *Rust* issue, and found that the Superior Court had considered whether the appellant was confused and misled by the *Miranda* warning, and had determined that there was no such confusion. The Court said:

> There is no basis for the contention that the juxtaposition of the *Miranda* warning and the statutory demand for a test vitiate the latter as a matter of law. The statement of the officer that 'you are entitled to an attorney throughout the entire interview' is not literally inconsistent with the requirement that he take a blood, breath or urine test without waiting for his attorney. Although the *Rust* opinion advises the officers to tell the arrestee that the right to counsel does not apply to the chemical test, it does not create a new unstatutory condition precedent to the application of section 13353 [The Implied Consent Law].[17]

The Court seems to take issue with *Wethern,* and states:

> If *Wethern* is read as holding that, as a matter of law, the *Miranda* warning excuses the driver's refusal to take the chemical test, it is inconsistent with the [holding] in *Kingston.* In [that] case the appellate court refrained from deciding that the driver was excused as a matter of law, and sent the case back for trial on the issue of fact.[18]

The reviewing Court in *Pepin v. Department of Motor Vehicles*[19] announced that the driver was not entitled to consult

16. 274 Cal. App.2d —, 79 Cal. Rptr. 433 (1969).

17. 274 Cal. App.2d —, —, 79 Cal. Rptr. 433, 437 (1969).

18. 274 Cal. App.2d —, —, 79 Cal. Rptr. 433, 438 (1969).

19. 275 Cal. App.2d —, 79 Cal. Rptr. 657 (1969).

his attorney before taking the test, and his insistence upon consulting his attorney before taking it supported the finding that he refused. The Court stated that substantial evidence supported the implied finding that the driver was not misled by an earlier *Miranda* warning. Apparently, the driver hurt himself when he testified:

> You hear so much scuttle-butt . . . about the effects of all those tests . . . so I just didn't know which one to take . . . that's why I wanted the advice of an attorney.

The trial court, it was reasoned, could conclude that the confusion was independently arrived at and was not the result of the statements by the arresting officer.

In *West v. Department of Motor Vehicles,*[20] the Court reversed the judgment of the trial court on the *Rust* issue. The Court of Appeal determined that where the arrested person is confused and where his response to questions asked him concerning his willingness to take the test indicates that he is asserting a right that he has been told he has as the result of the *Miranda* warning, it is incumbent on the officer to make an explanation. *West* is interesting because on September 26, 1969, the court modified its opinion to indicate that the confusion of the driver should have been apparent to the arresting officer. The court stated originally:

> Thus, it is necessary to send the case back to the trial court to make a finding as to whether or not the record does, in fact, show confusion on the part of the respondent.[1]

This sentence was modified as the result of the order of September 26, 1969, to provide an addition, so that the sentence now reads:

> Thus, it is necessary to send the case back to the trial court to make a finding as to whether or not the record

20. 275 Cal. App.2d —, 80 Cal. Rptr. 385 (1969); modified 1 Cal. App. 3d 1049a.

1. 275 Cal. App.2d —, —, 80 Cal. Rptr. 385, 387; modified 1 Cal. App. 3d 1049a.

> does, in fact, show confusion on the part of the respondent *which should have been apparent to the arresting officers.* (Emphasis added.)[2]

In *Lacy v. Orr,*[3] the peace officer told the driver he had a right to the presence of a lawyer while being questioned, and subsequently advised the driver of the requirements of the Implied Consent Law. The driver said he wanted a lawyer before submitting to the test. The reviewing Court affirmed the trial court's judgment denying to the driver a writ of mandate. The reviewing Court distinguished *Rust,* saying that the *Miranda* warning in *Rust* stated the driver had a right "beginning at that moment, to an attorney." In addition, the driver's testimony never indicated he had been confused.

The 1969 cases show that the courts have treated this duty on the part of the officer to be either absolute, as in *Wethern* and *Weber,* or dependent on the facts, as in *Walker,* so that if the trial court determined there was no confusion, the reviewing Courts generally will affirm. The trend of the cases indicates that confusion is not established simply because the driver refuses to take the test until he talks to his attorney.[4]

Perhaps, at some time, the State Supreme Court will clarify this disarray of judicial opinion, and will restore *People v. Ellis* to the authoritative position it once held.

The courts have indicated that there is no duty on an officer to explain to a driver that he has no right to have his own physician withdraw blood when the test is given. This point was made clear in *Beales v. Department of Motor Vehicles.*[5] It was there held that the driver's twice-pronounced statement that "he would take a blood test on the condition his own physician be permitted to draw the blood" was a refusal within the contemplation of section 13353 of the Vehicle Code. In *Wegner v. Department of Motor Vehicles,*[6] the Court reversed

2. Modified 1 Cal. App.3d 1049a.

3. 276 Cal. App.2d —, 81 Cal. Rptr. 276 (1969).

4. See also Ent v. Department of Motor Vehicles, 265 Cal. App.2d 936, 71 Cal Rptr. 726 (1968).

5. 271 Cal. App.2d 622, 76 Cal. Rptr. 662 (1969).

6. 271 Cal. App.2d 838, 76 Cal. Rptr. 920 (1969).

a finding by the trial court that there was no refusal. The driver refused to take the test, stating that he wanted the test to be given by his own doctor. The Court ruled that the driver was neither entitled to have his lawyer present, nor entitled to have his own doctor perform the test. The driver, at the hearing, maintained that the only reason he wanted his own doctor was because the technician summoned to take the blood test had dirty fingernails, and he feared infection. The Court, on appeal, took the position that if there had been objection to the dirty fingernails of the technician, this should have been indicated to the peace officer at the time the technician was summoned. It would have been a simple matter for the driver to indicate to the technician that his fingernails were dirty.

A related situation arose in *Westmoreland v. Chapman,*[7] where the driver refused to let a technician draw a blood sample simply because the driver did not like a technician performing this test. The court held that this was a refusal, and indicated that the driver need not be told that the licensed technician was authorized by statute to take the blood test. Where the driver wishes to have his own doctor perform the blood test, the Vehicle Code[8] indicates that he may do so, but that such a test is an *additional* test. The right to have his own doctor perform the test is not a right that he can assert under Vehicle Code section 13353, and whatever other rights he may have under the Vehicle Code need not be explained to him in order to make a refusal under section 13353 effective.

On the other hand, where a driver indicates that he is willing to take any one of the tests, and his responses indicate that he wants the peace officer to make the election, there is no refusal. The Court so held in *James v. State of California ex rel. Department of Motor Vehicles.*[9] Among other reasons given for the Court's conclusion that there was no refusal was the fact that the statute placed no affirmative duty on the driver to state which test he would take. This statement is

7. 268 Cal. App.2d 1, 74 Cal. Rptr. 363 (1968).

8. Vehicle Code § 13354.

9. 267 Cal. App.2d 750, 73 Cal. Rptr. 452 (1968).

remarkable in that the statute does contemplate that the driver be given his choice of which test he wishes to take, and the 1969 amendment to section 13353 makes it very clear that the driver shall be told that he has his choice. It would seem that if the choice were the driver's, and if he had the duty to take a test, one could well conclude that he had a duty to make an election. Whether the same results would obtain now, under the 1969 legislation, one may only speculate.

Under existing law, the statute requires the driver to be told that the failure to submit to the test will result in the suspension of his license for six months. In *Janusch v. Department of Motor Vehicles,*[10] the driver was told that he would "probably" have his license suspended by the Department of Motor Vehicles. It was urged that the use of the word "probably" vitiated compliance with section 13353. The Court, observing that the uncontradicted evidence in the record showed that the officer signed the sworn statement indicating that the failure to submit to the test "will" result in the suspension of the driver's license privileges, noted that the only evidence relating to any defect in the warning concerned the use of the word "probably" by the officer. The Court observed that it would have been preferable if the exact words of the statute had been used, but noted that it was probable, but not positive, that the license would be suspended. Obviously, the use of the word "probably" did not confuse the driver, and, thus, its use did not vitiate the warning.

In *Lacy v. Orr,*[11] the Court was also faced with the contention that the driver had been denied due process of law because he was not permitted to secure legal counsel after his arrest and, therefore, was prevented from extricating himself from the consequences of his refusal to submit to one of the tests. The Court, however, indicated that the fact that he was not permitted to call an attorney until after the booking procedure had ended did not deprive him of any rights with regard to Vehicle Code section 13353; whatever wrong might have occurred in withholding permission to make telephone calls

10. 276 Cal. App.2d —, 80 Cal. Rptr. 726 (1968).

11. 276 Cal. App.2d —, 81 Cal. Rptr. 276 (1968).

within the statutory period permitted by the Penal Code[12] was unrelated to the application of the section involved; that implied consent problems may be separated from the matters normally involved in arrest, detention, and acquiring of evidence.[13]

In *Wegner v. Department of Motor Vehicles,*[14] the driver, after refusing to take the test and upon his release from the police station, secured his own blood test and gave the results to the district attorney. The Court held that such an attempt did not overcome the effects of the refusal.[15]

The Court, in *Fankhauser v. Orr,*[16] reversed the judgment of the trial court that had granted a writ of mandate predicated on the assertion that the driver was too drunk to have refused.[17] In addition, *Fankhauser* determined the role the officer's sworn statement should play in *informal* proceedings held before the department pursuant to section 13353. Vehicle Code section 14104, relating to this type of *informal* hearing, admits evidence of this nature.[18]

In *Noll v. Department of Motor Vehicles,*[19] the Court explained subdivision (c) of Vehicle Code section 13353, with respect to the effect of a request for a continuance by the driver. The Court pointed out that where a hearing was scheduled within 15 days of a request by the driver, any re-

12. Penal Code § 851.5.

13. People v. Wren, 271 Cal. App. 2d 788, 76 Cal. Rptr. 673 (1969); People v. Fite, 267 Cal. App.2d 685, 73 Cal. Rptr. 666 (1968); People v. Hanggi, 265 Cal. App.2d Supp. 969, 70 Cal. Rptr. 540, 73 Cal. Rptr. 666 (1968).

14. 271 Cal. App.2d 838, 76 Cal. Rptr. 920 (1969).

15. The results here were fairly well forecast in Zidell v. Bright, 264 Cal App.2d 867, 71 Cal. Rptr. 111 (1968). See also Manuel, ADMINISTRATIVE LAW, *Cal Law—Trends and Developments 1969,* pp. 333–334.

16. 268 Cal. App.2d 418, 74 Cal. Rptr. 61 (1969).

17. The court relied on Bush v. Bright, 264 Cal. App.2d 788, 71 Cal. Rptr. 123 (1968).

18. In its analysis of the problem, the court did a far better job of explaining the admissibility of the sworn statement than did the court in Fallis v. Department of Motor Vehicles, 264 Cal. App.2d 373, 70 Cal. Rptr. 595 (1968) and this is probably one of the better cases in explaining the force of that code section as well as Vehicle Code § 14108, relating to evidence to be considered by the department.

19. 274 Cal. App.2d —, 79 Cal. Rptr. 236 (1969).

quest for a hearing extending the time beyond the 15 days would cause any stay of the department's order of license suspension to be lifted. However, the section would not require the termination of the stay pending completion of a hearing that the department had to afford, when the delay is occasioned by the failure of the department's witness to produce documents that are material to his testimony. In *Noll,* the driver contended that the peace officer had a very poor memory, and if the officer had brought his documents, more would have been established on cross-examination. The Court noted that discovery was available to the driver and that if the reports of the policeman were so important, they should have been secured by the driver. Since he did not, their absence is unexplained, and the Court will assume that the report was wilfully suppressed.

In *Pepin v. Department of Motor Vehicles,*[20] the Court pointed out that there was no exception to the automatic suspension where driving was necessary in employment or earning a livelihood.[1]

III. Procedure at Administrative Hearings

A. *In General*

During 1969, a number of cases were decided relating to (1) jurisdiction of administrative agencies to hold hearings, (2) burden of proof, (3) application of the Administrative Procedure Act,[2] (4) res judicata, and (5) quasi-legislative hearings.

B. *Jurisdiction of Administrative Agencies*

1. To Reach Former Employees

In Cal-Pacific Collection, Inc. v. Powers,[3] the California Supreme Court discussed the jurisdiction of the Department

20. 275 Cal. App.2d —, 79 Cal. Rptr. 657 (1969).

1. Vehicle Code § 13210 does not apply.

2. Govt. Code §§ 11500 et seq.

3. 70 Cal.2d 135, 74 Cal. Rptr. 289, 449 P.2d 225 (1969).

of Professional and Vocational Standards to proceed against a licensee of a Collection Agency Licensing Bureau, as well as the individual plaintiffs employed by the collection agency in various capacities. The question arose because of an attempt by the licensing agency to institute and take disciplinary action against these individual employees and Cal-Pacific, although Cal-Pacific had surrendered its license prior to the time that disciplinary action had been instituted. During the pendency of the disciplinary proceedings, the qualification certificate issued to Cal-Pacific's secretary was revoked by operation of law for nonpayment of fees. Cal-Pacific contended that the acceptance by the licensing agency of the voluntary surrender of the license deprived the agency of jurisdiction to proceed against it. The licensing agency in the proceeding relied upon Business and Professions Code section 6949.1, stating in part:

> The voluntary surrender of a license . . . shall not deprive the Director of jurisdiction to proceed with any . . . disciplinary proceeding against such license. . . .

The Supreme Court had no difficulty in determining that pursuant to the plain reading of the language of the statute, the licensing agency was not deprived of jurisdiction by the voluntary surrender. Moreover, the power of the agency to take disciplinary action was not limited in any way to proceedings already pending at the time of the surrender by Cal-Pacific. The Court so held in the face of Cal-Pacific's contention that pursuant to section 6949 of the Business and Professions Code, under which it purportedly surrendered its license, such a surrender could be made only "so long as no disciplinary action is then pending against said licensee. . . ." As between these two sections, 6949 and 6949.1, the latter was held by the Court to rule; otherwise, its enactment would have been simply a useless gesture.

With regard to the individual who held only a qualification certificate, no section such as 6949.1 of the Business and Professions Code was applicable. The individual cer-

tificate-holders had to rely upon Business and Professions Code section 118, applicable to all statewide agencies within the Department of Professional and Vocational Standards, which provided in part in subdivision (b):

> The . . . exception, or forfeiture by operation of law of the license issued by the board in the department . . . shall not, during any period in which it may be renewed, restored, reissued or reinstated, deprive the board of its ability to institute or continue a disciplinary proceeding against a licensee upon any ground provided by law or to enter an order suspending or revoking a license or otherwise taking disciplinary action against a licensee on any such ground. . . .

The case also dealt with three employees of Cal-Pacific. They held no license or certificate, and had terminated their employment with Cal-Pacific prior to the institution of the disciplinary action seeking to disqualify them from holding any office or employment in the collection agency business. Section 6930 of the Business and Professions Code then in effect authorized the director, upon finding a violation by an "employee" of a licensee, to order the "employee" disqualified from further employment in the collection agency business. After the institution of the proceedings, the word "employee," as found in section 6930 of the Business and Professions Code, was changed to read "person." With the change, the Court noted that the director was authorized to institute proceedings of disqualification after the employee had terminated his employment, but the Court was unable to find any statutory provisions that would have authorized such proceedings at the time the matter was instituted. As to the former employees at the time the action was instituted, the director had no jurisdiction to proceed to disqualification.

Cal-Pacific is one of the more recent cases in California dealing with the ability of the licensing agency to proceed against persons who at one time or another had been under the control of the agency and who, by one means or another,

attempt to remove themselves voluntarily from its control.[4]

2. To Impose Conditions

Related to the question of jurisdiction is the question of what happens when the agency attempts to extract from someone dealing with it a condition that is beyond the statutory authority of the administrative agency.

In *Worthington v. State Board of Control,*[5] an employee of the State Board of Control obtained a release from a claimant seeking compensation under the provisions of Government Code sections 13970–13973, which compensate private citizens injured while preventing a crime. The release purported to extinguish all claims against the state relating to the subject matter of the claim. The Court considered the release totally ineffective. The program of indemnity under which the claimant sought benefits existed only by reason of the statute. The procedure was prescribed by the State Board of Control. Neither the statute nor the rules refer to any requirement of a release before payment could be made. When the legislature acted on the Board of Control's recommendation calling for payment of a portion of the applicant's

4. For agencies within the Department of Professional and Vocational Standards, the reader should review the provisions of Business and Professions Code § 118. Where the agency is not within the Department of Professional and Vocational Standards, and there is no other code section relating ot the effect of withdrawal of an application for licensure or an attempted surrender of a license, the reader may find some enlightenment in cases such as Jones v. SEC, 298 U.S. 1, 80 L.Ed. 1015, 56 S.Ct. 654 (1935) and Miller v. Board of Police Commissioners, 181 Cal. App.2d 562, 5 Cal. Rptr. 272 (1960), holding that a withdrawal of an application, absent a statute to the contrary, deprives the agency of jurisdiction to continue to hear the case. On the other hand, once a license is issued, the licensee has submitted himself to the control of the agency, and an attempted surrender of the license, absent a statute to the contrary, will not deprive the agency of power to proceed with the hearing and make a decision. Albert Albek, Inc. v. Brock, 75 Cal. App.2d 173, 170 P.2d 508 (1946) cf. Grand v. Griesinger, 160 Cal. App.2d 307, 325 P.2d 475 (1958). If, however, the license has expired, absent a statute to the contrary, an agency may not institute proceedings against the former licensee. O'Neil v. Department of Professional & Vocational Standards, 7 Cal. App.2d 395, 46 P.2d 234 (1935).

5. 266 Cal. App.2d 697, 72 Cal. Rptr. 449 (1968).

claim, once this determination was made, the role of the staff of the Board of Control was only ministerial, i.e., to see to the drawing of the funds and transmittal of them to the claimant. The act of the zealous employee, in seeking to hold the legislative appropriation for ransom until the applicant signed the general release, was said by the Court to be without authority. The release was an unlawful condition to payment. It was of no effect and its existence provided no defense to the mandamus proceeding brought by the petitioner.

3. Exercise of Jurisdiction Without a Hearing

The courts also had before them the question of what types of hearings an administrative agency could be required to give. In *Orr v. Superior Court,*[6] the State Supreme Court reviewed the provisions of the Financial Responsibility Law[7] contained in the Vehicle Code, and determined that where a driver was involved in an accident, before he would be required to show ability to respond in damages as a condition of retaining his driving privileges, the Department of Motor Vehicles would have to review the material before it to determine whether there was a reasonable possibility that a judgment might be recovered against the driver. The Court indicated that the determination of the department could be made from accident reports that the drivers are obligated to make pursuant to Vehicle Code section 16000, and from other evidence submitted to the department. This did not require the department to hold a hearing and the department, in making its determination, was not required to decide whether the driver was at fault; rather, it was to make a determination whether there was any credible evidence under which the driver could reasonably be considered culpable.

An administrative proceeding that results in a municipal employee being suspended from his employment without a prior hearing was upheld in *Apostoli v. City and County of San Francisco.*[8] In *Apostoli,* the applicable provisions

6. 71 Cal.2d —, 77 Cal. Rptr. 816, 454 P.2d 712 (1969).

7. Vehicle Code §§ 16000 et seq.

8. 268 Cal. App.2d 728, 74 Cal. Rptr. 435 (1969).

provided for a full hearing on appeal to a higher commission, with right to a public trial and power to secure the attendance of witnesses. While a fair hearing implies adequacy of notice, the Court also determined that where the petitioner (1) had received information from his order of discharge that action was being taken against him and (2) had been given a copy of the investigation report making him fully aware of the reasons for his suspension, he could not successfully contend that he did not have adequate notice, or that the order of discharge was defective in omitting the section of the agency's regulation that it was charged he violated.

4. To Reverse Former Decisions

In *Eastham v. Santa Clara Elementary School District,*[9] the Court had before it the question of whether an administrative agency, having once acted, has authority to reverse its prior determination. In *Eastham,* a school district had determined the starting salary for employees of the school district, establishing a kind of parity among certain classes of employees. Later, the district changed its salary policy. The contention was made that where the board had once adopted this policy, it could not change it. The claim was made that the board had exhausted its power over the subject matter, and had no further continuing jurisdiction. The Court determined that the fact that the district had for some time established the same salary schedule for nurses and teachers did not mean that it was arbitrary and unreasonable to change that policy. The Court discerned differences between teachers and nurses, and further found evidence to support the board's determination that different levels of competitive salary had evolved for the two positions. The Court, rather than being bound by the theory that there had been a prior decision that the board was powerless to change because it had exhausted its jurisdiction over the subject matter, relied instead on the idea that there was nothing that compelled the district to treat nurses and teachers the same forever. The board has the power to

9. 270 Cal. App.2d 807, 76 Cal. Rptr. 198 (1969).

change its salary policy and to classify its employees, even those with tenure, differently, according to training, experience, and duties.

C. *Burden of Proof*

While, generally, it may be assumed that where an administrative agency seeks to discipline an existing licensee, the burden of proof is on the administrative agency,[10] there are cases where this may not be true. Among these is the case where a taxpayer attacks an assessment made on his property by an assessor. In proceedings before the local administrative agency, the taxpayer has the burden of showing that the assessor's figures are improper. In *Griffith v. County of Los Angeles,*[11] the Court held that it was presumed that the assessor's actions were proper, and the taxpayer had the burden.

D. *Application of the Administrative Procedure Act*

In Manuel, ADMINISTRATIVE LAW, *Cal Law—Trends and Developments* 1969, p. 337, it was noted that a person who conducts an administrative hearing need be a lawyer only if the law requires it. *Serenko v. Bright*[12] held that in formal hearings before the Department of Motor Vehicles, the referees conducting the proceedings for the department need not be persons possessing the same qualifications as those required of hearing officers conducting proceedings normally under the Administrative Procedure Act.[13] During 1969, this point was reaffirmed in several cases.[14]

10. Val Strough Chevrolet v. Bright, 269 Cal. App.2d 855, 75 Cal. Rptr. 363 (1969).

11. 267 Cal. App.2d 837, 73 Cal. Rptr. 773 (1969).

12. 263 Cal. App.2d 682, 70 Cal. Rptr. 1 (1969).

13. Govt. Code §§ 11500 et seq. See also Manuel, ADMINISTRATIVE LAW, *Cal Law—Trends and Developments 1969*, p. 337.

14. See the cases Lacy v. Orr, 276 Cal. App.2d —, 81 Cal. Rptr. 276 (1969); Walker v. Department of Motor Vehicles, 274 Cal. App.2d —, 79 Cal. Rptr. 433 (1969); Noll v. Department of Motor Vehicles, 274 Cal. App.2d —, 79 Cal. Rptr. 236 (1969); Reirdon v. Department of Motor Vehicles, 266 Cal. App.2d 808, 76 Cal. Rptr. 269 (1969).

It was argued in *Department of Motor Vehicles v. Superior Court*,[15] that section 14107 of the Vehicle Code, merely indicates who is to *conduct* a formal hearing, not who is to *preside*. The Court rejected this contention. The Court determined that section 14107 indicates that the hearing may be conducted by a referee appointed from officers or employees of the department. If it is borne in mind that a *referee* is one who is appointed to take testimony, hear the parties, and report findings, section 14107 could hardly be used to support the contention that there was a distinction between conducting and presiding over hearings. The provisions of the Administrative Procedure Act will govern the actions of an administrative agency only to the extent that the law relating to that particular function of the agency makes the Administrative Procedure Act applicable. Where the sections dealing with the particular function of the agency carve out some other pattern or rule, to that extent, the Administrative Procedure Act does not apply.[16]

E. *Res Judicata*

In *Petry v. Board of Retirement*,[17] the Court held that a decision of the Workmen's Compensation Appeals Board to the effect that an injury arose out of and occurred in the course of employment, was not res judicata in proceedings before the Retirement Board of the County of Los Angeles. The Court reasoned that the retirement board had valid and independent rights with respect to determining whether the employee had suffered injury in the course and scope of his employment.[18] Whatever the validity of this contention, the result seems inconsistent with that reached in *Pathe v. City of*

15. 271 Cal. App.2d 770, 76 Cal. Rptr. 804 (1969).

16. See also Hough v. McCarthy, 54 Cal.2d 273, 5 Cal. Rptr. 668, 353 P.2d 276 (1960); Fankhauser v. Orr, 268 Cal. App.2d 418, 74 Cal. Rptr. 61 (1968) and August v. Department of Motor Vehicles, 264 Cal. App.2d 52, 70 Cal. Rptr 172 (1968).

17. 273 Cal. App.2d —, 77 Cal. Rptr. 891 (1969).

18. The court relied upon Flaherty v. Board of Retirement, 198 Cal. App. 2d 397, 18 Cal. Rptr. 256 (1961) and Grant v. Board of Retirement, 253 Cal. App.2d 1020, 61 Cal. Rptr 791 (1967).

Bakersfield,[19] which held that a decision of the Industrial Accident Commission was binding upon a local pension board.[20] It seems odd to indicate that a pension board such as the one in *Pathe* does not have the same rights and responsibilities as the retirement board in *Petry*.

F. *Quasi-Legislative Hearings*

In *California Grape etc. League v. Industrial Welfare Commission,*[1] the Court had before it the question concerning the kind of hearing required when an agency is adopting rules and regulations. The Court determined that proceedings for the adoption of rules are quasi-legislative in character, and a hearing of a judicial type is not required.[2] The commission was not required to make *specific* proposals before or at public hearings, so that those persons at the hearing who were, perhaps, at odds with the ultimate determination of the commission, were not entitled to have notice or information as to what specific proposals might be proposed. The statute did not require such proposals.[3] The commission did not err in failing to make available at hearings experts and staff of the commission who had prepared and compiled statistical studies, surveys, and other data considered by the commission, or to place in evidence and allow cross-examination with respect to any of the studies, surveys, and data. Apparently, the conten-

19. 255 Cal. App.2d 409, 63 Cal. Rptr. 220 (1967).

20. See French v. Rissel, 40 Cal.2d 477, 254 P.2d 26 (1953); Gale v. State Board of Equalization, 264 Cal. App. 2d 689, 70 Cal. Rptr. 469 (1968) and Manuel, ADMINISTRATIVE LAW, Cal Law *—Trends and Developments 1969,* p. 321.

1. 268 Cal. App.2d 692, 74 Cal. Rptr. 313 (1969). For further discussion of this case, see Leahy, CONSTITUTIONAL LAW, in this volume.

2. The court followed Rivera v. Division of Industrial Welfare, 265 Cal. App.2d 576, 71 Cal. Rptr. 739 (1968). See also Manuel, ADMINISTRATIVE LAW, *Cal Law—Trends and Developments 1969,* p. 315.

3. The court noted the provisions of Government Code § 11425 relating to the requirements for quasi-legislative exercise of power and providing that on the date and at the time designated in the notice the state agency shall afford any interested person or his duly authorized representative or both an opportunity to present statements, arguments, or contentions in writing, with or without opportunity to present the same orally. Impliedly, the decision determined that § 11425 did not require anything approaching a quasi-judicial hearing.

tion had been made that various studies should have been introduced and subject to attack and that the people who prepared them should have been subject to cross-examination.[4]

IV. Judicial Review

A. *Limitation on Court Review*

Cases decided in 1969 have again emphasized some limits on the jurisdiction of courts to review acts of administrative agencies.

1. Legislative Limitations

a. Alcoholic Beverage Control Review

An example of legislative limitations placed on court review of decisions of administrative agencies is noticeable in the field of alcoholic beverage control. In order to overcome the inordinate amount of time it takes to have decisions of the Department of Alcoholic Beverage Control become final, the legislature, in 1967, adopted a more speedy procedure.[5] History had indicated that while it took some time for the Alcoholic Beverage Control Appeals Board to decide cases, there were some unexplainable delays occurring in the Superior Courts.[6] The legislature decided to eliminate the Superior Court from the review process, and, in 1967, enacted section 23090.5 of the Business and Professions Code providing:

4. See Ray v. Parker 15 Cal.2d 275, 101 P.2d 665 (1940) and Olive Proration etc. Committee v. Agriculture etc. Committee, 17 Cal.2d 204, 109 P.2d 918 (1941). The court indicated that statutes involved in those cases may have imposed more rigid standards and requirements than those found in § 11425 of the Government Code and the applicable Labor Code provisions. Accordingly, cases that seemed to indicate that there are more stringent requirements for quasi-legislative hearings should be considered in light of the statutes involved. Otherwise, the courts may adopt the attitude, as did the court in the instant case, that they have no authoritative bearing on review of quasi-legislative type hearings.

5. Stats. 1967, Ch. 1525, amending Business and Professions Code §§ 23090 et seq.

6. *Report on Alcoholic Beverage Control Act,* Assembly Interim Committee on Governmental Organization, 1961–1963, Volume 12, No. 7 (January 1963), pp. 7–11.

> No court of this state except the Supreme Court and the courts of appeal to the extent specified in this article shall have jurisdiction to review, affirm, reverse, correct, or annul any order, rule or decision of the department or to suspend, stay or delay the operation or execution thereof or to restrain, enjoin or interfere with the department in the performance of its duties, but a writ of mandate shall lie from the Supreme Court or the courts of appeal in any proper case.

In *Department of Alcoholic Beverage Control v. Superior Court*[7] and *Kirby v. Superior Court and Gil Mar Club, Inc.*,[8] the Court of Appeals ruled that the Superior Court lacked jurisdiction to review a decision of the Department of Alcoholic Beverage Control in a proceeding instituted after the effective date of the changes divesting the Superior Court of such jurisdiction.

In the first of these cases,[9] the Court of Appeals noted the similarity of sections of the Business and Professions Code[10] to sections of the Labor Code,[11] relating to judicial review of decisions of the Workmen's Compensation Appeals Board. These sections provide that review must be sought in the reviewing court within 30 days after the Alcoholic Beverage Control Appeals Board filed its final order. Since the petitioners failed to seek review within the time specified, the Court held that the decision of the department must stand, and, by virtue of Business and Professions Code section 23090.5, that the Superior Court was without jurisdiction to entertain or to stay the enforcement of the suspension order, regardless of the merits. The procedure now provided for by Business and Professions Code section 23090.5 contemplates that decisions of the department or of the Alcoholic Beverage

7. 268 Cal. App.2d 67, 73 Cal. Rptr. 780 (1968).

8. 275 Cal. App.2d —, 80 Cal. Rptr. 381 (1969); see also Department of Alcoholic Beverage Control v. Superior Court, 268 Cal. App.2d 7, 73 Cal. Rptr. 671 (1968).

9. 268 Cal. App.2d 67, 73 Cal. Rptr. 780 (1968).

10. Bus. and Prof. Code, §§ 23089 and 23090.

11. Lab. Code §§ 5810 and 5950.

Control Appeals Board will be reviewed pursuant to writs of review.

It had been contended that the 1967 amendment to the Business and Professions Code[12] unconstitutionally divested the Superior Courts of jurisdiction granted to them by the state Constitution.[13] These decisions upheld the power of the legislature to limit review to the courts named in the act, and held that the Superior Courts could be constitutionally divested of jurisdiction. There was no undue impairment of the rights of the aggrieved party to obtain judicial relief, because the Superior Court really had exercised no greater power than the reviewing court. Since all the courts in the chain of review can use only the substantial evidence rule to determine if the findings of the department are supported by the evidence, the petitioner lost no real right.

The 1967 amendment took effect on November 8, 1967, and it made no difference when the acts of the petitioners were alleged to have happened; the decisive time was when the Alcoholic Beverage Control Appeals Board filed its final decision. It was at this time that the right to judicial review matured. The amendments then in effect governed the matter.

In spite of this case, some Superior Courts were unwilling to deny jurisdiction. In the second case, *Kirby v. Superior Court and Gil Mar Club, Inc.*,[14] the Department of Alcoholic Beverage Control, through its director, was forced to seek a petition for writ of prohibition. Based on the prior case, the Court of Appeals had no difficulty sustaining the position of

12. Bus. and Prof. Code §§ 23090 et seq.

13. California Constitution, Article VI, § 10 reads as follows:

The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition.

Superior courts have original jurisdiction in all causes except those given by statute to other trial courts.

The Court may make such comment on the evidence and the testimony and credibility of any witness as in the opinion is necessary for the proper determination of the cause. (Added Nov. 8, 1966.)

14. 275 Cal. App.2d —, 80 Cal Rptr. 381 (1969).

the department and reaffirmed the constitutionality of section 23090.5; the state Supreme Court denied hearing.

b. Public Utilities Commission Review

Another limitation on the Superior Courts that prohibits interference with decisions of administrative agencies is seen in *Hickey v. Roby*.[15] The Superior Court set aside a permanent injunction that purported to enjoin a water company and some of its officers from transferring, cancelling, or reversing stock ownership on the water company's books without consent of the appellant. The Public Utilities Commission intervened in the Superior Court action and moved to set aside the injunction, contending, among other things, that there were outstanding final decisions of the Public Utilities Commission that bore on the question of whether the injunction should have issued. The implied finding of the trial court was that the injunction would have interfered with the commission in the performance of its duties in contravention of Public Utilities Code section 1759. The Court of Appeals held that each of the decisions of the commission relied on was a final order at the time of the Superior Court action, and was thus conclusive and binding upon the parties. No order of the commission is subject to review in any court of the state except the state Supreme Court, and even if an order of the commission is palpably erroneous in law, it is binding and conclusive on all courts of the state until annulled by the state Supreme Court.[16] If the commission acts after the Superior Court has assumed jurisdiction to determine the rights of parties, a later decision by the commission, made within its jurisdiction, will have the effect of superseding any prior judgment of the Superior Court. In *Hickey,* the Superior Court had no jurisdiction, by virtue of the Public Utilities Code,[17] to issue the injunction. It was contended by the appellant that by intervening, the commission had estopped itself to deny jurisdiction of the Superior Court. However, the Court of Appeals

15. 273 Cal. App.2d —, — Cal Rptr. — (1969).

16. See, for instance Pub. Util. Code § 1759.

17. Pub. Util. Code § 1759.

found this contention had no merit. Although the appellant was not a party before the Public Utilities Commission in the decision that had then become final, this fact still did not empower the Superior Court to negate a decision of the commission made within the commission's jurisdiction. The appellant's remedy was to appeal to the commission, not the Superior Court.

B. *Exhaustion of Administrative Remedies*

Among the limitations on Superior Court jurisdiction established by case law is the doctrine of *exhaustion of administrative remedies.* In *Noonan v. Green,*[18] the Court reaffirmed the vitality of the doctrine, which provides that where an administrative remedy is available, a party seeking judicial review must first exhaust that remedy.

> . . . Where in an administrative proceeding there is an administrative appellate body provided by statute, that body must exercise its jurisdiction before the courts may be called upon to act, and the parties to an administrative proceeding may not waive the benefits of the statute established for public reasons, nor may jurisdiction be conferred upon a court by consent.[19]

Thus, the Court recognized that exhaustion of administrative remedies goes to the very jurisdiction of the court, and until the remedies are exhausted, a court can have no jurisdiction over the subject matter.[20]

In *Reimel v. House,*[1] the decision of the Court notes that

18. 276 Cal. App.2d —, 80 Cal. Rptr. 513 (1969).

19. 276 Cal. App.2d —, —, 80 Cal. Rptr. 513, 517.

20. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715 (1941). Thus, it was error for the superior court to assume jurisdiction in a controversy between a school district and pupil concerning the suspension of the pupil for refusing to wear the uniform prescribed by the school where there was an administrative remedy available to review the suspension. The doctrine was held applicable even in the face of the contention by the appellant that the requirement that she wear a certain uniform was unconstitutional. United States v. Superior Court, 19 Cal.2d 189, 120 P.2d 26 (1941); Walker v. Munro, 178 Cal. App.2d 67, 2 Cal. Rptr. 737 (1960).

1. 268 Cal. App.2d 780, 74 Cal.

while on review a licensee objected to the use of a deposition. At the time of the hearing before the administrative agency, the Department of Alcoholic Beverage Control, no objection was made on any ground urged on appeal. The Court stated that an issue not raised before the trier of fact could not ordinarily be raised for the first time on appellate review, and this meant that it could not be raised for the first time before the Alcoholic Beverage Control Appeals Board. Moreover, the Court noted that decisions of the department could not be defeated for mere error unless the reviewing tribunal, after examination of the entire cause, including the evidence, should be of the opinion that the error complained of had resulted in a miscarriage of justice.[2]

C. *Non-reviewable Administrative Action*

In *Jones v. Oxnard School District*,[3] Sadie Jones applied for employment with the Oxnard School District. The school district and State Board of Education denied her application. On appeal, a dismissal, after a general demurrer to the complaint, was affirmed.

The amended complaint before the reviewing court alleged that the appellant was a qualified elementary school teacher and the holder of a general elementary teaching credential. She had registered her credential with the particular county superintendent of schools and applied for a teaching position in the Oxnard School District. She further alleged that the district employed a number of elementary school teachers who were not duly certificated and that such employment was in violation of the law, which provides for the hiring of non-certificated teachers only on applications accompanied by a statement of need indicating that there are no qualified regularly certificated applicants for the positions available. The

Rptr. 345 (1969). See Manuel, ADMINISTRATIVE LAW, *Cal Law—Trends and Developments 1969*, pp. 316, 342.

2. California Constitution, Article VI, § 13. See also Ward v. County of Riverside, 273 Cal. App.2d —, 78 Cal. Rptr. 46 (1969).

3. 270 Cal. App.2d 587, 75 Cal. Rptr. 836 (1969). For further discussion of this case, see Leahy, CONSTITUTIONAL LAW, in this volume.

Court determined that the appellant's argument called for judicial review of a nonreviewable administrative action.

The appellant did not attack the propriety of the action of the State Board of Education in issuing the provisional credentials that permitted other persons to be employed in the position sought by her. She had elected not to make the state board a party to the action. Her attack was directed against the action of the local district that led to the ultimate decision of the state board.

The Court noted that the attack that she made could succeed only if she alleged either that the district refused to exercise its discretion or that it failed to act as enjoined by law, but that neither situation was present in the case. Since traditional mandate under Civil Procedure Code section 1085 was inapplicable, the Court reasoned that administrative mandamus under Civil Procedure Code section 1094.5 was not applicable. The action of filing the certificate of need was not within the definition of a quasi-judicial activity so as to be within the ambit of the latter section. It simply was a preliminary step by one body enabling another to act. The Court stated that since no vested procedural or substantive right of the appellant's employment was involved, due process did not require a method of judicial review to be formulated where none was provided by the statute.

In *Worthington v. State Board of Control,*[4] the court held that the role of the State Board of Control in drawing and transmitting funds appropriated by the legislature to compensate private citizens for personal injury incurred while trying to prevent a crime is only a ministerial act. The board, at its discretion, may compensate such injured persons. The Court indicated that the statute[5] involved merely created a procedure through which claims for indemnity could be received and evaluated by the board of control. Under the statute, the board then makes recommendations to the legislature for appropriation. If a claimant is not satisfied with the board of control's compensation recommendation, his remedy is to ap-

4. 266 Cal. App.2d 697, 72 Cal. Rptr. 449 (1968).

5. Govt. Code §§ 13970–13973.

proach his legislative representative and seek hearings before the appropriate subcommittee of the Assembly Ways and Means Committee or the Senate Finance Committee. In turn, the legislature is free to reduce, increase, or totally reject the board's recommendations. The board of control acts only in an advisory capacity, and any dissatisfaction with the procedures followed by the board, the rules adopted by it, or the advice it gives to the legislature, must be pursued through exclusively legislative means. There is no judicial review.

Another example of nonreviewable administrative action stems from the general rule that where an officer is vested with discretionary power, a court cannot control this discretion. Accordingly, mandamus will not lie to compel the district attorney to prosecute a charge of perjury where his duties in this respect are discretionary and not mandatory. This was the holding in *Ascherman v. Bales*,[6] although Government Code section 26501 provided that the district attorney shall institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses, when he has information that such offenses have been committed. Although the statute uses the word "shall," the context of the word in the statute indicates that the duty contemplated by the legislature was discretionary.

Although mandamus will not lie to control discretion, it was held in *Priest v. Housing Authority*[7] that where the exercise of discretion necessarily involves the interpretation of a statute, courts could entertain the action to determine if the interpretation of the statute was correct. In *Priest,* the trial court found that mandamus could not be used to control a discretionary act, and that the respondent therein had exercised its discretionary power in deciding that a contract did not come within the purview of a statute involved. The reviewing court, on the other hand, took the position that interpretation or construction of a statute is a matter of law, not the exercise of discretionary authority, and that mandamus

6. 273 Cal. App.2d —, 78 Cal. Rptr. 445 (1969).

7. 275 Cal. App.2d —, 80 Cal. Rptr. 145 (1969).

was a proper remedy to correct a misinterpretation of a statute.[8]

D. *Standing To Institute Proceedings*

The question of who may bring an action to review an administrative action was touched on in *California School Employees Association v. Sequoia etc. School District*,[9] holding that the association had standing to sue in its own name to enforce the employment rights of its members. The issue before the Court was whether a food service program, by which a nongovernmental concern was granted a concession to provide vending machines, violated the rights of school cafeteria employees. The concession agreement resulted in the termination of their employment. The Court held that the association had a justifiable public interest in the case.

The Court also recognized that the association had such a stake in the outcome as to assure the kind of adverseness that would sharpen the issues.[10]

In *American Federation of Teachers, Local 1713, AFL-*

8. Likewise, in Proctor v. San Francisco Port Authority, 266 Cal. App.2d 675, 72 Cal Rptr. 248 (1968), the adoption by the Port Authority of salary ranges for its employees in excess of the powers granted to it by the Harbors and Navigation Code, could be reviewed by the court and declared invalid, and once the court declared the new salary ranges invalid, the court could order payment to the employees under salary ranges that existed prior to the adoption of the void range. However, in Lawe v. El Monte School District of Los Angeles, 267 Cal. App.2d 20, 72 Cal. Rptr. 554 (1968), it will be noted that where the governing board of a school district has the power to fix and order compensation, the court will accord to the board a great deal of leeway and respect, leaving it to the governing board, for example, to determine the extent to which it will give credit for teaching experience outside the district. The court will not interfere with its determination in this respect if the policy is reasonable in nature, fairly applied without discrimination.

9. 272 Cal. App.2d 98, 77 Cal. Rptr. 187 (1969).

10. Professional Fire Fighters, Inc. v. City of Los Angeles, 60 Cal.2d 276, 32 Cal. Rptr. 830, 384 P.2d 158 (1963); International Association of Fire Fighters v. City of Palo Alto, 60 Cal.2d 295, 32 Cal. Rptr. 842, 384 P.2d 170 (1963). The court having determined that the association had standing, it was not necessary to determine whether the association had an alternative right to maintain the action, as a taxpayers' suit to enjoin an illegal expenditure.

CIO v. San Leandro Unified School District,[11] the American Federation of Teachers was held to have had no standing to seek a writ of mandate directing the school district to employ a probationary teacher. The decision not to employ the probationary teacher was arrived at after a hearing held pursuant to the Administrative Procedure Act.[12] All that was involved were the rights of the employee. Since no interest or right of the union was invaded, no relief could be granted to the union. The union was not a proper party and could not state a cause of action.[13] While the reasons given in the case appear to be valid, it should be noted that traditionally where there has been an administrative hearing of an adjudicatory nature, standing to seek judicial review has been limited to those persons who were parties before the administrative agency.[14]

E. *Other Equitable Considerations*

The equitable nature of mandamus was amplified in *Genser v. McElvy*,[15] wherein the petitioner sought to compel the state architect to revoke his approval of a change order providing for the substitution of plastic pipe for metal pipe. However, the Court noted that this proceeding was really moot, and mandamus would not lie where the plastic pipe had been installed and encased in the walls and floors before a school district was joined as an indispensable party. The Court noted that although mandamus is generally classed as a legal remedy, the question of whether it should be applied is controlled by equitable considerations.

11. 276 Cal. App.2d —, 80 Cal. Rptr. 758 (1969).

12. Govt. Code §§ 11500 et seq.

13. Hence, the court held that cases such as International Association of Fire Fighters v. City of Palo Alto, 60 Cal.2d 295, 32 Cal. Rptr. 842, 384 P.2d 170 (1963) and International Association of Fire Fighters v. County of Merced, 204 Cal. App.2d 387, 22 Cal. Rptr. 270 (1962) were inapplicable.

14. Madruga v. Borden, 63 Cal. App.2d 116, 146 P.2d 273 (1944); 2 Cal. Jur.2d ADMINISTRATIVE LAW § 209, p. 343.

15. 276 Cal. App.2d —, 82 Cal. Rptr. 420, 82 Cal. Rptr. 521 (1969).

V. Scope of Review

A. *In General*

Traditionally, adjudicatory decisions of local and state-wide agencies given adjudicatory powers by the state constitution are reviewed by the substantial evidence rule.[16]

B. *Constitutionally Created Agencies*

In *County of Los Angeles v. Tax Appeals Board No. 2 for the County of Los Angeles,*[17] the Court, discussing the applicability of Code of Civil Procedure section 1094.5, asked the question whether an agency exercises an adjudicatory function in considering facts presented at a hearing. The Court noted that where a party has a beneficial interest in the subject matter of the administrative proceedings, and has the right to appear, he may properly institute proceedings for mandamus. One of the universally recognized results of the substantial evidence rule, where mandamus is sought to review the decision of a local agency, is that the court has no power to conduct a trial de novo and substitute its findings on matters within the jurisdiction of the local board. In the instant case, the board was created under the authority of California Constitution, Article XIII, section 9.5. The Court concluded that where there was *no* evidence to support the findings of the administrative agency, the action of the agency could not stand, and the Superior Court acted properly in remanding the proceedings to the board and commanding the board to set aside its decision and to conduct further hearings.

In *Petry v. Board of Retirement of the Los Angeles County Employees Retirement Association,*[18] the Court again dealt with a local agency and determined that in reviewing a board decision neither the Superior Court nor a reviewing court could reweigh the evidence. A reviewing court, in applying

16. Some of the more fundamental notions in this regard were commented upon in Manuel, ADMINISTRATIVE LAW, *Cal Law—Trends and Developments 1969*, p. 310.

17. 267 Cal. App.2d 830, 73 Cal. Rptr. 469 (1968).

18. 273 Cal. App.2d —, 77 Cal. Rptr. 891 (1969).

the substantial evidence rule when reviewing a decision of a local agency, applies the same standard as is applicable to a review of trial court findings. That is, all conflicts in the evidence must be resolved in favor of the decision, and all reasonable inferences will be applied in support of the decision.

So well-established is the rule and so easy is it to understand, that one is amazed that the trial courts are still having problems. In *Upton v. Gray*,[19] the trial court, in dealing with a decision of a local administrative agency, accepted new evidence on and decided anew, an issue previously decided by the agency. This action on the part of the trial court was held error by the Court of Appeals. When the subject under review is a decision of a local or county administrative agency that by law is required to hold a hearing, the power of the court is strictly limited, and it may not exercise its independent judgment or allow a trial de novo on fact issues formally before the agency. The Court noted that review is limited to a determination of whether the agency, based on the evidence before it, abused its discretion or acted in an arbitrary or capricious manner. The Superior Court cannot reweigh the evidence. While the reviewing court dwelt on the nature of the agency in determining that the trial court acted improperly in accepting new evidence, it followed a line of cases previously decided.[20] The Court might have simply resolved this issue on the basis of subdivision (e) of the Code of Civil Procedure section 1094.5. *Barkin v. Board of Optometry*,[1] establishes that the limitations therein provided are applicable whether the substantial evidence rule is followed or the court is given the right to conduct a so-called limited trial de novo under the Code of Civil Procedure section 1094.5.[2]

19. 269 Cal. App.2d 352, 74 Cal. Rptr. 783 (1969).

20. For example, Beverly Hills Federal Savings and Loan Association v. Superior Court, 259 Cal. App.2d 306, 66 Cal. Rptr. 183 (1968).

1. 269 Cal. App.2d 714, 75 Cal. Rptr. 337 (1969).

2. Other cases decided reaffirming that the scope of review with respect to local agencies is the substantial evidence rule, are: Apostoli v. City and County of San Francisco, 268 Cal. App.2d 728, 74 Cal. Rptr 435 (1969); Griffith v. County of Los Angeles, 267 Cal. App.2d 837, 73 Cal. Rptr 773 (1968), cert. den., 395 U.S. 945, 23 L.

In *Ishimatsu v. Board of Regents,*[3] the Court determined that mandamus was proper to obtain review of a University of California decision to terminate a librarian's employment (1) where a hearing was granted (2) evidence was taken and (3) determinations of fact were vested in the hearing agency. The Court held that under the state Constitution the university is a statewide administrative agency possessing adjudicatory powers. The employee had contended that the Constitution did not delegate to the university the power to make such an adjudicatory determination of facts. The reviewing Court answered that the university was a statewide administrative agency with powers derived from Article IX, section 9, of the state Constitution, possessed of full powers of organization and government, and subject only to such legislative control as may be necessary to insure compliance with the terms of endowments of the university and the security of its funds. The Court interpreted Article IX, section 9 of the Constitution as granting to the university adjudicatory powers with respect to problems relating to its personnel. The employee attempted to attack the evidence presented, charging it was not credible or competent. The Court indicated that there may have been conflicts in the evidence but that these conflicts were resolved against the employee. Strangely, although the Court was dealing with what it determined was a constitutional agency, the Court sought refuge in cases standing for the proposition that where the trial court makes an independent determination on the facts, the reviewing court is bound by the decision of the trial court, if there is any evidence to

Ed. 463, — S.Ct. —. Griffith indicates again that the taxpayer must challenge the determination of the value of his property for tax purposes, show the local board that the assessor's figures are improper and that the assessments are not fair or equitable. To sustain his burden, the taxpayer must introduce some evidence of the assessor's inequity before any burden is cast on the assessor. Before the administrative agency, the assessor can stand on the presumption that his assessment is fair and equitable. Thus, the taxpayer must bear in mind, before he seeks mandamus to review the actions of the board denying his request for reassessment, that his failure to make out a prima facie case will make the respondent local agency's task much simpler on appeal.

3. 266 Cal. App.2d 854, 72 Cal. Rptr. 756 (1968).

support it.[4] The use of those decisions is not consistent with the application of the substantial evidence test.

The California Constitution, Article XX, section 14 requires the legislature to provide for the maintenance of a State Board of Health. However, *Alta-Dena Dairy v. County of San Diego*[5] held that decision-making power was not granted. Although the local health officer has certain powers with regard to control of milk, his actions as an agent of a statewide administrative agency could be reviewed by a trial de novo.

In *Gubser v. Department of Employment*,[6] a discharged state employee sought review of a decision of the State Personnel Board. That a decision of the State Personnel Board is reviewable under the substantial evidence rule has long since been established.[7] Nevertheless, the trial court sought to interfere with the decision of the State Personnel Board without giving effect to the substantial evidence rule in favor of the agency's decision. *Gubser* gives a definition of substantial evidence that might be helpful. It defines "substantial evidence" as "relevant evidence that a reasonable mind might accept as adequate to support a conclusion, that is, whether a fair and reasonable mind would accept it as probative of the issue." The Court further stated:

> It matters not that we might have come to a different conclusion had the decision been ours to make in the first instance, or that reasonable men might differ, as respondent argues; it is enough that a reasonable mind could reach the same conclusions as reached by the Appeals [sic] Board.[8]

4. The court followed Moran v. Board of Medical Examiners, 32 Cal. 2d 301, 196 P.2d 20 (1948) and Yakov v. Board of Medical Examiners, 68 Cal.2d 67, 64 Cal. Rptr. 785, 435 P.2d 553 (1968).

5. 271 Cal. App.3d 66, 76 Cal. Rptr. 510 (1969). For further discussion of this case, see Leahy, CONSTITUTIONAL LAW, in this volume.

6. 271 Cal. App.2d 240, 76 Cal. Rptr. 577 (1969).

7. Shepherd v. State Personnel Board, 48 Cal.2d 41, 307 P.2d 4 (1957), and see Sweeney v. State Personnel Board, 245 Cal. App.2d 246, 53 Cal. Rptr. 766 (1966).

8. 271 Cal. App.2d 240, —, 76 Cal. Rptr. 577, 581 (1969).

When facts constituting an impairment of First Amendment rights are uncontradicted, the question is one of law and not of fact, and thus the state Supreme Court may make an independent examination of the whole record to determine if there has been an infringement of constitutional rights. In *Los Angeles Teachers' Union v. Los Angeles City Board of Education,*[9] the Supreme Court reversed a judgment of the trial court denying a writ of mandate. The lower court had refused to stop the local board of education from interfering with the right of the teachers' union to circulate a petition on noninstruction time. This case is not particularly startling, for it simply announces the test for appellate review that is applicable in any situation where there is a claim of violation of First Amendment rights where First Amendment freedoms have been involved. This doctrine has already been applied to the review of a decision of the Public Utilities Commission; ordinarily, the scope of review of that agency's decisions would be limited by the substantial evidence rule.[10]

C. *Legislatively Created Agencies*

With respect to legislatively created agencies of the State of California, the state Supreme Court in *Merrill v. Department of Motor Vehicles,*[11] recapitulated the existing rules without making any new or different application of those rules. The Court was dealing with a decision of the Department of Motor Vehicles refusing an application for a motor vehicle dealer's license.

The controlling statute, Code of Civil Procedure section 1094.5,[12] does not indicate in what cases the court is authorized

9. 71 Cal.2d —, 78 Cal. Rptr. 723, 455 P.2d 827 (1969). For further discussion of this case, see Leahy, CONSTITUTIONAL LAW, in this volume.

10. Manuel, ADMINISTRATIVE LAW, *Cal Law—Trends and Developments 1969*, p. 310.

11. 71 Cal.2d —, 80 Cal. Rptr. 89, 458 P.2d 33 (1969).

12. The court quotes from Code of Civil Procedure § 1094.5(b) the following:

"The inquiry in such a case [i.e., one involving review of an administrative decision by writ of mandate] shall extend to the questions whether the respondent was [sic] proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is estab-

to exercise its independent judgment concerning the evidence. Such a determination, accomplished by means of judicial decision, depends on whether the right or interest effected by the administrative decision is a vested one. If the right is vested, the decision is reviewed by means of a limited trial de novo in which the court not only examines the record for errors of law also, but exercises its independent judgment by weighing the evidence adduced at the hearing together with any other evidence properly admitted by the Court. The Court noted that in the case before it, the plaintiff was seeking a dealer's license. He did not have one. As a result, the Court was not dealing with a vested right within the meaning given that term by the decided cases.[13] The decision indicated that where a statewide agency affects vested rights, the Superior Court may exercise its independent judgment on the weight of the evidence produced before the administrative agency, together with any other evidence *properly* admitted by the Court. The Court had in mind Code of Civil Procedure section 1094.5 (d), limiting introduction of evidence outside the record to that relevant evidence that in the exercise of due diligence could not have been produced at the administrative hearing or that was offered there and was erroneously excluded. Indeed, the state Supreme Court cited section 1094.5 subdivision (d), and indicated that the Superior Court cannot, at will, admit simply any evidence it deems relevant.

For example, in *Barkin v. Board of Optometry*,[14] a comprehensive and especially well-written opinion, the Court deter-

lished if the respondent has not proceeded in the manner required by law, the decision or order is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the *evidence;* and in all other cases abuse of discretion is established if the court determines that the findings are not supported by *substantial evidence* in the light of the whole record." (Italics are the court's.)

13. The court cites especially Southern California Jockey Club, Inc. v. California Horse Racing Board, 36 Cal.2d 167, 223 P.2d 1, and McDonough v. Goodcel, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205 (1939).

14. 269 Cal. App.2d 714, 75 Cal. Rptr. 337 (1969).

mined that the trial court was correct in refusing to receive evidence. This was a mandamus proceeding to review a decision of the Board of Optometry disciplining an optometrist licensee; a limited trial de novo could properly be held. The offered evidence was to the effect that the members of the board were prejudiced against the licensee. The petition, however, did not charge bias and prejudice, and made no showing why such evidence could not have been made a part of the record at the administrative level pursuant to section 1094.5 subdivision (d). The petitioner had the burden of showing either that through the exercise of reasonable diligence such evidence could not have been produced at the administrative hearing, or that he attempted to produce it and that it was erroneously excluded. Mere speculation that neither the hearing officer nor the board would have allowed a showing of this kind could not excuse the petitioner's failure to offer the evidence.[15]

In *Orr v. Superior Court*,[16] the state Supreme Court evolved yet another test in reviewing a decision of the Department of Motor Vehicles that suspended a license pursuant to the Financial Responsibility Law.[17] The Department of Motor Vehicles had contended that on a showing that a driver had been involved in an automobile accident involving damages of the statutory level,[18] the driver would have to demonstrate ability to respond in damages or face suspension of his license; whether or not the driver was at fault was not material. The driver claimed that due process entitled him to a complete hearing before the department and/or the superior court, where the department had to establish culpability.

The earlier case of *Escobedo v. State of California*[19] indicated that the license might be suspended without the necessity of a hearing, and contained some dicta to the effect that if the

15. Petitioner argued because of the provisions of Government Code § 11512, providing that an agency member shall not withdraw or be subject to disqualification if this disqualification would prevent the existence of a quorum to act in a particular case.

16. 71 Cal.2d —, 77 Cal. Rptr. 816, 454 P.2d 712 (1969).

17. Vehicle Code § 16080.

18. Vehicle Code § 16000.

19. 35 Cal.2d 870, 222 P.2d 1 (1950).

particular driver was not at fault his license should not be suspended. The court in *Orr* reviewed not only *Escobedo,* but cases such as *Sokol v. Public Utilities Commission*[20] and *Endler v. Schutzbank,*[1] which involved essential rights and the necessity for a hearing. The Court concluded that before ordering the suspension of a license, the department must determine whether there is a reasonable possibility that a judgment may be recovered against the driver, and so must consider the issue of culpability. However, it is not required that the Department of Motor Vehicles decide as between conflicting versions of the accident whether the driver was in fact at fault. If there is any credible evidence on which he could possibly be considered culpable, the Court states such evidence could be believed by the trier of fact in a lawsuit, and will suffice to support a determination that it is reasonably possible that a judgment may be recovered against the driver.

Justice Burke, speaking in *Orr,* states:

> Neither is the department called upon to make sophisticated judgments upon any claim or [sic] contributory negligence or of last clear chance, etc., which may arise; such claims commonly turn in the first instance upon determinations of disputed facts, and as such such determinations are not the responsibility of the department. Even if the facts are conceded, questions of contributory negligence and of last clear chance, if at all close or intricate, will not serve to defeat a decision by the department that a judgment against the involved driver is reasonably possible . . . .[2]

With respect to court review of a department order suspending a license, the driver alleging nonculpability is entitled to a review of the evidence submitted to the department, so that the court can determine whether it supports the implied finding that there is a reasonable possibility that a judgment for damages will be rendered against the driver (and owner).

20. 65 Cal.2d 247, 53 Cal. Rptr. 673, 418 P.2d 265 (1966).

1. 68 Cal.2d 162, 65 Cal. Rptr. 297, 436 P.2d 297 (1968).

2. 71 Cal.2d —, —, 77 Cal. Rptr. 816, 821, 454 P.2d 712, 717 (1969).

The issue is not that indicated by the trial court in this case, that is, whether the driver was actually without fault. Instead, the issue is only whether the evidence before the department supports its implied finding of the reasonable possibility of judgment, and, accordingly, it is appropriate to limit the scope of review to a review of the department's action, rather than permit an unlimited new trial on the issue of fault.

No cases have arisen since the decision in *Orr v. Superior Court,*[3] but it is apparent that the only concern of a reviewing court will be whether the decision of the department is reasonable; this is more akin to a substantial evidence case than it is to a limited trial de novo case. It would appear that so long as the determination of the department is reasonable without resort to working out sophisticated concepts of contributory negligence, last clear chance, and other doctrines, the agency will be upheld. Where the Superior Court can exercise its independent judgment on appeal, the reviewing court looks to the record to see if there is substantial evidence, including reasonable inferences, to support the findings and judgment of the Superior Court.[4] If the decision is supported by substantial evidence, it will be affirmed.[5]

D. *Penalties Ordered by Administrative Agencies*

The reviewing courts have indicated quite clearly in both *Imperial Termite Control, Inc. v. Structural Pest Control Board*[6] and *West Romaine Corp. v. California State Board of Pharmacy,*[7] that the courts, superior as well as reviewing, are without power to review the extent of a penalty imposed by an administrative agency, as long as the penalty is within administrative limits and there has been no abuse of discretion. Indeed, one reviewing court appears to have expressed impatience with a trial court that attempted to invade the discre-

3. 71 Cal.2d —, 77 Cal. Rptr. 816, 454 P.2d 712 (1969).

4. Val Strough Chevrolet Co. v. Bright, 269 Cal. App.2d 855, 75 Cal. Rptr. 363 (1969).

5. See Walker v. Department of Motor Vehicles, 274 Cal. App.2d —, 79 Cal. Rptr. 433 (1969) and Janusch v. Department of Motor Vehicles, 276 Cal. App.2d —, 80 Cal. Rptr. 726 (1969).

6. 275 Cal. App.2d —, 80 Cal. Rptr. 156 (1969).

7. 266 Cal. App.2d 901, 72 Cal. Rptr. 569 (1968).

tion of a board, in spite of a warning to the trial court contained in an unpublished opinion in a prior appeal of the case.[8]

VI. Some Constitutional Questions Incidental to Administrative Law

A. *Due Process in Prior Convictions*

Under Vehicle Code section 13352, the Department of Motor Vehicles is required to suspend the driving privileges of a driver who, within a seven-year period, is twice convicted of drunk driving. As the result of *People v. Coffey*,[9] drivers have been asserting in the second or subsequent proceeding that the first conviction was void because the driver was deprived of his right to counsel. Consequently, there have been attempts by some traffic courts, in the second or subsequent proceeding, to declare invalid a first drunk driving conviction, citing *Coffey*.

In the case of *Mitchell v. Orr*,[10] a driver had suffered a forfeiture of bail while in Florida. Later, he was brought before the Municipal Court in California on a subsequent charge of drunk driving, and there he attempted to attack the forfeiture of bail which took place out of the state. The Municipal Court, in the second drunk driving case, ruled that the prior forfeiture of bail was void on the basis of *Coffey*. The reviewing court held that this determination was binding on the Department of Motor Vehicles, and while the duty to suspend for a second conviction was mandatory, the department should have felt bound by the determination of the traffic court. A forfeiture of bail is deemed the equivalent of a conviction in California, under the Vehicle Code. It would be hard to determine how Mitchell could possibly have been deprived of his right to counsel, as contemplated by *Coffey*, where he had forfeited bail. There was never any contention made in *Mitchell* that the state authorities by duress, coercion, or other-

8. 266 Cal. App.2d 901, 72 Cal. Rptr. 569 (1968).

9. 67 Cal.2d 204, 60 Cal. Rptr. 457, 430 P.2d 15 (1967).

10. 268 Cal. App.2d 813, 74 Cal. Rptr. 407 (1969).

wise compelled his forfeiture of bail and kept him away from counsel. The best that can be gleaned from the record of the case is that the driver was never expressly advised of his right to counsel and therefore *People v. Coffey* applied. *Query:* Is the traffic court clerk compelled to advise every motorist who wishes to forfeit bail of his right to counsel at the time he posts bail for various offenses ranging from moving violations to minor parking offenses?

However, in the case of *De La Vigne v. Department of Motor Vehicles,*[11] the Court reaffirmed the position that the department is bound by a subsequent determination of a traffic court that a prior conviction was invalid. At present, there are no reported cases discussing the question of what happens in the absence of a determination by the traffic court with respect to the prior conviction. Normally, the prior conviction is pleaded, and under Vehicle Code section 23102, if found, its existence is reflected in the penalty. However, there are cases where the prior conviction is stricken by the district attorney on his own motion and its validity is not then raised by the pleadings. The petitioner in *Stenback v. Municipal Court,*[12] attempted to have a pretrial determination as to the validity of prior convictions. The Court held that there is no such right, but that the convictions could be challenged at the time of arraignment for judgment. At that time, the court will have before it the Department of Motor Vehicles' record involving the driver under Vehicle Code section 13209, and, as a part of the allocation, the driver may contest the validity of the prior convictions. It would appear that if the state is bound by a determination of the traffic court, a determination would also seem to be binding on the driver. On the other hand, where he does not raise the question of validity (1) by a pretrial determination (2) during trial or (3) at the allocution, it could be argued that he has waived the right to do so. Perhaps the driver would be barred by some concept akin to res judicata or collateral estoppel, if he suffers a judgment that assumes the validity of the prior conviction.

11. 272 Cal. App.2d 820, 77 Cal. Rptr. 675 (1969).

12. 272 Cal. App.2d —, 76 Cal. Rptr. 917 (1969).

B. *Economic Regulations and Due Process*

Barkin v. Board of Optometry,[13] concerns economic regulation in the sense that the Board of Optometry was enforcing regulations that forbade using an assumed name in advertising. The licensee claimed that the agency unlawfully and illegally discriminated against him, citing the United States Supreme Court decision in *Yick Wo v. Hopkins.*[14] The contention was made that other similarly operated organizations were allowed to so advertise and the board was making no effort to curtail them. The Court, however, discerned that there were differences between the licensee's operation and the other organizations, and held that these differences warranted the conclusion that there was a rational distinction between the two. The court held to be constitutional a statute that limited certain licentiates, particularly in the healing arts, from indicating that the cost of their services were at a discount or less than the costs generally available in the community. The Court also held this statute was not an undue restriction on the right of free speech, although it was asserted by the licensee that he was disciplined for aiding unions in composing material that the union sent out or distributed.

C. *Free Speech*

In *Los Angeles Teachers' Union v. Los Angeles City Board of Education,*[15] the Court held that First Amendment rights guaranteed by the United States Constitution protected employees of a school district in their circulation of a petition on noninstruction time. The teachers sought to circulate a petition during their duty-free lunch period. The Court observed that school teachers, like others, have the right to speak freely and effectively on public questions. The Court was seeking to balance the interest of a teacher as a citizen in commenting upon matters of public concern, and the interest of the state as an employer in promoting the efficiency of the public serv-

13. 269 Cal. App.2d 714, 75 Cal. Rptr. 337 (1969).

14. 118 U.S. 356, 30 L.Ed. 220, 6 S.Ct. 1064 (1886).

15. 71 Cal.2d —, 78 Cal. Rptr. 723, 455 P.2d 827 (1969). For further discussion of this case, see Leahy, CONSTITUTIONAL LAW, in this volume.

ice. This case illustrates the trend toward greater recognition of the rights of public employees, as well as the limitation on administrators who would impair First Amendment freedoms for the purpose of curbing disharmony, inconvenience, and unrest. If the school district were concerned that discussion during the noon hour involving off-duty teachers would disturb other teachers engaged in planning work or engaged in other phases of their instructional duties, the Court said that the way to handle this was not to abolish speech, but to adopt some type of regulation prohibiting unduly raucous discussions of any sort in any room where teachers are engaged in planning work or similar activities.

According to *Dunbar v. Governing Board of the Grossmont Junior College District,*[16] a governing board of a junior college district has the right to determine, control, and direct the educational program offered at the college during regular school hours, but such regulation is subject to limitations imposed by the First Amendment to the United States Constitution. The question arose because an organization, limited to students registered at the school, wished to present a debate on the Vietnam war between a member of the John Birch Society and a member of the Communist Party. The school board rejected the Communist speaker, apparently because he was a member of the Communist Party of the United States. The Court held the school board did not have to open the campus to the speakers. However, once it opened its doors, the board had to then observe the restrictions and limitations contained in the First Amendment and not discriminate against speakers. Apparently, as part of its educational program, the district could be more restrictive in choosing its speakers than if the forum had been opened to the general public. The Court concluded, in this respect, that the school authorities could reject a speaker because of the trivial nature of the subject matter, or because of the speaker's lack of expertise, intelligence, or other qualifications that would bear on the ability to make a meaningful contribution to the educa-

16. 275 Cal. App.2d —, 79 Cal. Rptr. 662 (1969). For further discussion of this case, see Leahy, CONSTITUTIONAL LAW, in this volume.

tional program. But, in controlling speech on campus, once a forum for guest speakers has been set up as part of an educational program, the district could not exercise unbridled censorship.

VII. Public Employees and Administrative Law

There have been a number of cases of special interest to public employees. In *Almond v. County of Sacramento,*[17] an action seeking to reinstate civil service employees previously discharged for being absent without leave while participating in a strike, the Court held that public employees have no right to strike, and their absence could not be justified because of the fact that they were on strike. The local civil service commission was found not to have abused its discretion in determining that the employees were absent without leave. The Court, in *Almond,* cited several cases in support of the view that in the absence of legislative authorization, public employees in general do not have the right to strike.[18] The rule was settled, and the Court felt bound by it.[19]

In *Gubser v. Department of Employment,*[20] the Court defined the term "inexcusable neglect of duty" found in Government Code section 19572 subdivision (d), which is one of several grounds for dismissal of a state employee, to mean "an intentional or grossfully negligent failure to exercise due diligence in the performance of a known official duty." Apparently, the Court took the view that the expression remains an abstraction until viewed in the light of the facts surrounding a particular case. Employees in some of the field offices of the Department of Employment apparently grossly and falsely inflated the number of job placements, and the

17. 276 Cal. App.2d —, 80 Cal. Rptr. 518 (1969).

18. For example, see Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, 54 Cal.2d 684, 8 Cal. Rptr. 1, 355 P.2d 905 (1960).

19. Recent legislation found in Government Code §§ 3500 to 3509, relating to recognition of public employees' organizations, did not provide a statute to the contrary even as amended in 1968.

20. 271 Cal. App.2d 240, 76 Cal. Rptr. 577 (1969).

petitioner-supervisor of these employees was charged with inexcusable neglect of duty in that he knew, or should have known, the reports were false. The Court stated that the supervisor had a duty to determine that the basic statistics on which the project was grounded were truthful; otherwise, there would have been little reason for having a supervisor at all. The Court deemed it futile to argue that the supervisor was under no duty to verify reports submitted by his subordinates, by even a spot check, simply because no one had ordered the supervisor to do so. The Court considered it to be an inherent duty of the supervisor to see that the reports made under his command were correct.

In *Ferdig v. State Personnel Board*,[1] the state Supreme Court held that the State Personnel Board acted properly in setting aside the appointment of an employee who had been erroneously treated as a veteran, when in fact his service in the merchant marine did not qualify him for veterans' preference credits. Apparently, the employee had presented discharge papers showing service in the United States Naval Reserve, as distinguished from the United States Navy, to establish his veterans' preference. Although another record presented showed his service to be in wartime service in the merchant marine, the employing department notified the State Personnel Board that the employee had the necessary veterans' points to move him up to the No. 4 position on the list. Later, a question was raised with the department for whom the employee worked, and, as a result, the State Personnel Board determined that the veteran's points were not properly granted the employee. His appointment to a civil service position was revoked. The state Supreme Court in *Ferdig* upheld the determination by the State Personnel Board that the prior treatment of the employee was improper and against the law, and that if the employee were not a veteran, he could not continue to be so treated. Because the State Personnel Board has only those powers conferred on it by the state Constitution and statutes, the employee could not be given rights contrary to

1. 71 Cal.2d —, 77 Cal. Rptr. 224, 453 P.2d 728 (1969).

these basic laws. As a result, the State Personnel Board had jurisdiction to take corrective action with respect to the appointment. Although there are various grounds for discharging a state employee from civil service, the inclusion of this kind of mistake need not be enumerated, for it defied logic to say that the mere enumeration in the statute of the methods of separating employees from civil service where the appointment had been validly made, compels the conclusion that no jurisdiction exists to rectify the action of the board where the appointment had been made without authority. The appointment being illegal, the revocation of the appointment was proper, and this was so even though the probationary period relating to employees had run.

In *Hamm v. City of Santa Ana,*[2] the employee submitted his resignation on a form furnished by the city. An ordinance provided that the City Manager might permit the withdrawal of a resignation filed within 10 days of its effective date. The question was posed whether a resignation of an officer effective at a future date may be subsequently withdrawn prior to the date stated in the written resignation. The Court reviewed a number of cases[3] and concluded that it was forced to deal with the method of resignation withdrawal provided by the

2. 273 Cal. App.2d —, 78 Cal. Rptr. 102 (1969).

3. People v. Porter, 6 Cal. 26 (1855), wherein the state Supreme Court held that the tenure of an officer does not depend upon the will of the executive but on the incumbent. The court in *Hamm* commented that the author of the Supreme Court opinion had stated that he had no doubt that before the stated date the resignation could have been withdrawn. This observation was treated by the court of appeal as being obiter dicta because the resignation had not been so withdrawn, nor was there any attempt to do so. In People v. Marsh, 30 Cal. App. 424, 159 P. 191 (1916), a resignation was signed and delivered, addressed to the board of supervisors, effective upon its being filed. Six days after filing, the board accepted the resignation, although on the same day that the board met and before any action was taken on the resignation, a revocation had been served on each member of the board. The court in *Marsh* held that the common-law doctrine, permitting revocation of a resignation before acceptance had been abrogated by the provisions of law, now Government Code §§ 1750, 1770, gave the incumbent the absolute right to resign without any restrictions. Hence, the resignation was effective when the revocation was not. In Meeker v. Reed, 70 Cal. App. 119, 232 P. 760 (1924), the court had indicated that no acceptance was necessary to make a resignation effective.

legislative body, and since the employee apparently did not comply with the ordinance permitting a withdrawal, the resignation remained effective.[4]

In *California State Employees Association v. Regents of the University of California,*[5] the Court determined that the provisions of Government Code sections 1150 through 1157, dealing with salary deductions from state employees and officers for the purpose *inter alia* of paying dues in employee organizations, did not apply to the employees of the University of California. There is nothing in those statutes, the Court held, requiring that university employees be treated as part of the state government for purposes of payroll deductions. While for many purposes university employees are state employees,[6] whether they are state employees for purposes of the application of any specific code section will be determined by looking at the statutes, with reference to the whole system of law of which they are a part. The Government Code had within its provisions special definitions interpreted so as to exclude the University of California from the scope of the legislation.[7]

In *Board of Trustees v. Superior Court,*[8] a school teacher had been suspended on charges that she was incompetent due to mental disability, the information relating to this incompetency being based on stale evidence. In an earlier appeal, the reviewing court had held that the trial court could not base its decision in proceedings under the Education Code[9] on such out-of-date expert testimony. In a retrial of the matter, the school district sought the appointment of a psychiatrist who could make a current psychiatric evaluation of the teacher. The trial court denied the request. The reviewing court in *Board of Trustees* held that unless it was proper to cause a teacher to submit to a psychiatric examination by a qualified

4. See also French v. State Board of Education, 265 Cal. App.2d 955, 71 Cal. Rptr. 713 (1968).

5. 267 Cal. App.2d 667, 73 Cal. Rptr. 449 (1968).

6. For example, Tolman v. Underhill, 39 Cal.2d 708, 294 P.2d 280 (1952) and Fraser v. University of California, 39 Cal.2d 717, 249 P.2d 283 (1952).

7. Govt. Code §§ 1150–1157.5.

8. 274 Cal. App.2d —, 79 Cal. Rptr. 58 (1969).

9. Ed. Code §§ 13412 and 13417.

expert, the proceedings under Education Code section 13412, would be rendered useless and, thus, there was *good cause* to procure the examination. The Court not only ordered the Superior Court to require an examination, but, in addition, stated that it would *not* condition its peremptory writ on an order that a court reporter and the teacher's counsel be present during the psychiatric examination. Due to the atmosphere required by psychiatric examination, its purpose would be defeated by such procedures.

VIII. Rules and Regulations

One of the more interesting cases deciding matters of rules and regulations was *Yeoman v. Department of Motor Vehicles,*[10] which held that a statute giving the State Board of Education authority to adopt reasonable regulations concerning operation of school buses did not confer on the board authority to direct the Department of Motor Vehicles to issue certificates for school buses. The discussion centered on the authority of one agency of government over another. The agencies involved were coordinate branches of the executive branch of government, with the Board of Education having no constitutional power to assert supremacy over the Department of Motor Vehicles or to make regulations binding on the Department of Motor Vehicles. The regulation as adopted could not have the effect of enlarging the grant of power under which the Board of Education acted. While the regulation itself was invalid, the legislature adopted a later measure that validated the procedure followed, and conferred on the Department of Motor Vehicles the power to issue school bus licenses. Having enforced certain rules and regulations of the Board of Education, the Department of Motor Vehicles was held by the Court to have effectively adopted such rules without having formally accepted the regulatory scheme. Thus, the Court announced that one agency's rules and regulations may be informally adopted by another. The two departments decided

10. 273 Cal. App.2d —, 78 Cal. Rptr. 251 (1969).

upon a cooperative adjustment by which the Department of Motor Vehicles issues certificates based on standards partly of its own creation and partly the creation of the Board of Education.

IX. Qualifications of Licensees

In *Kirby v. Alcoholic Beverage Control Appeals Board,*[11] the Court held that a conviction for failing to report and fully pay federal income taxes was a conviction of a crime involving moral turpitude. Earlier, in the case of *In re Hallinan,*[12] the state Supreme Court held that this type of conviction was not a crime that inherently involved moral turpitude. Subsequently, federal cases determined that the offense, described by 26 U.S.C. section 7201, involves a charge of fraud and a conviction thereof is based on a finding of fraud. Additionally, a host of other cases were cited to show that fraud was a necessary ingredient to a conviction, and, hence, moral turpitude is involved.

In *H. D. Wallace & Associates v. Department of Alcoholic Beverage Control,*[13] the Court did not have before it the question of moral turpitude as in *Kirby v. Alcoholic Beverage Control Appeals Board,*[14] but it did have the question of whether a liquor licensee might be disciplined because of a record of misdemeanor drunk driving. The Court took the position that this did not involve moral turpitude, and that it had not been demonstrated that there was a connection between the infractions of the licensee and the conduct of the licensed business. The Court ignored the fact, however, that the asserted misconduct involved the misuse of alcohol, the very commodity that the licensee was licensed to sell. The Court apparently took the position that insobriety on and off the highway had no actual effect on the conduct of the licensed business. The view of the Court seems narrow. It does not concern itself with the nature of the commodity sold or the right

11. 270 Cal. App.2d 535, 75 Cal. Rptr. 823 (1969).

12. 43 Cal.2d 243, 272 P.2d 768 (1954).

13. 271 Cal. App.2d 589, 76 Cal. Rptr. 749 (1969).

14. 270 Cal. App.2d 535, 75 Cal. Rptr. 823 (1969).

of the state to protect itself in advance of the apprehended evil. This should be contrasted with *Saunders v. City of Los Angeles*,[15] where conviction of bookmaking was held to be a rational basis to deny renewal of a license to operate an automobile repair business.

On the other hand, in the case of *Kirby v. Alcoholic Beverage Control Appeals Board*,[16] the Court took the position that where the licensee was found to have employed a minor on his premises in violation of Business and Professions Code section 25663, a good-faith reliance by the licensee on some evidence of the employee's majority was not a defense. Business and Professions Code section 25660, sets forth certain statutory requisites for establishing this defense, and the Court held that this statute must be satisfied. In order that there be a defense under the latter section, which also is a defense for serving liquor to a minor, the licensee has the dual burden of showing not only that he acted in good faith, free from the intent to violate the law, but that he exercised good faith in reliance on the kind of documentary evidence contemplated by the section.

15. 273 Cal. App. 2d —, 78 Cal. Rptr. 236 (1969). For further discussion of this case, see Leahy, CONSTITUTIONAL LAW, in this volume.

16. 267 Cal. App.2d 895, 73 Cal. Rptr. 352 (1968).